

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2012 MSPB 86**

---

Docket No. CH-0353-11-0509-I-1

---

**Gwenesther F. Manning,  
Appellant,**

**v.**

**United States Postal Service,  
Agency.**

July 17, 2012

---

Gwenesther F. Manning, Burnham, Illinois, pro se.

James B. Franks, Esquire, Chicago, Illinois, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**OPINION AND ORDER**

¶1 The appellant timely petitions for review of an initial decision that dismissed her appeal of a denial of restoration for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal for a jurisdictional hearing.

**BACKGROUND**

¶2 The appellant suffered a compensable injury in 1999 and was absent from work for a number of years. Initial Appeal File (IAF), Tab 7 at 4, Tab 20 at 6. In 2007, the Office of Workers' Compensation Programs (OWCP) terminated her

benefits on the basis that she had refused to cooperate with its efforts to obtain current medical documentation. IAF, Tab 12 at 77-78. In December 2009, the agency removed her from her City Carrier position based on a charge that she was unable to return to duty after a year's continuous absence without pay. *Id.* at 55, 57-58.

¶3 Meanwhile, the appellant pursued her OWCP claim through various appeals, and she submitted requests for reasonable accommodation to the agency. IAF, Tab 7 at 14-17, Tab 12 at 45-47, 65-68, Tab 13 at 10-14, Tab 20 at 32-35, Tab 25 at 23-27. The agency denied her accommodation requests because there was no evidence that her medical condition had changed such that she was capable of working. *See* IAF, Tab 7 at 14-15, Tab 20 at 38, Tab 25 at 2-3. The appellant filed a formal discrimination complaint and, when the agency issued a Final Agency Decision finding no discrimination, *see* IAF, Tab 8, Tab 12 at 21-44, she timely appealed, IAF, Tab 1. She requested a hearing in her appeal. *Id.* at 2.

¶4 The administrative judge construed the appeal as an appeal of a denial of restoration. After affording the appellant proper notice of the elements and burdens of proof on jurisdiction, IAF, Tabs 2, 23, the administrative judge dismissed the appeal for lack of jurisdiction without a hearing, implicitly finding that the appellant had been removed for misconduct and, therefore, her absence was not based on a compensable injury, IAF, Tab 28, Initial Decision (ID) at 4. The administrative judge did not adjudicate the appellant's discrimination claim in light of her jurisdictional findings. *Id.* at 4-5.

¶5 The appellant petitions for review. Petition for Review (PFR File), Tabs 1, 3. With her petition for review, the appellant submits documents that are already part of the record and, thus, are not new and material evidence. *See Meier v. Department of the Interior*, [3 M.S.P.R. 247](#), 256 (1980). In a timely supplement to her petition for review, she submits a copy of an arbitrator's award, PFR File, Tab 3 at 7-31, that was not available prior to the close of the record below and

which we have considered in reaching this decision. The agency has not responded to the petition for review.

### ANALYSIS

¶6 The Federal Employees' Compensation Act and its implementing regulations at 5 C.F.R. part 353 provide that federal employees who suffer compensable injuries enjoy certain rights to be restored to their previous or comparable positions. [5 U.S.C. § 8151](#); *Walley v. Department of Veterans Affairs*, [279 F.3d 1010](#), 1015 (Fed. Cir. 2002), *abrogated on other grounds by Garcia v. Department of Homeland Security*, [437 F.3d 1322](#) (Fed. Cir. 2006) (en banc); *Chen v. U.S. Postal Service*, [114 M.S.P.R. 292](#), ¶ 7 (2010), *overruled on other grounds by Latham v. U.S. Postal Service*, [117 M.S.P.R. 400](#), ¶ 10 (2012). In the case of a partially recovered employee, i.e., one who cannot resume the full range of her regular duties but has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements, an agency must make every effort to restore the individual to a position within her medical restrictions and within the local commuting area. *Chen*, [114 M.S.P.R. 292](#), ¶ 7; [5 C.F.R. §§ 353.102](#), 353.301(d). An individual who is partially recovered from a compensable injury may appeal to the Board for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. *Chen*, [114 M.S.P.R. 292](#), ¶ 8; [5 C.F.R. § 353.304](#)(c).

¶7 The administrative judge found that the appellant could establish Board jurisdiction by making a nonfrivolous allegation of jurisdiction. ID at 3. While the administrative judge's approach was appropriate under Board precedent at the time, the Board has since modified the jurisdictional test in restoration appeals to require proof of jurisdiction by preponderant evidence. Therefore, to establish jurisdiction over the agency's denial of her requests for restoration, the appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a

part-time basis, or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the agency's denial was arbitrary and capricious. *Latham*, [117 M.S.P.R. 400](#), ¶ 10; *see also Bledsoe v. Merit Systems Protection Board*, [659 F.3d 1097](#), 1104 (Fed. Cir. 2011). If the appellant makes nonfrivolous allegations of jurisdiction with respect to all four prongs of the jurisdictional standard, she is entitled to a jurisdictional hearing. *See Bledsoe*, 659 F.3d at 1102; *Garcia*, 437 F.3d at 1344.

¶8 To be entitled to any restoration rights under 5 C.F.R. part 353, an employee must have been absent from her position as a result of a compensable injury. *See Tat v. U.S. Postal Service*, [109 M.S.P.R. 562](#), ¶ 9 (2008); [5 C.F.R. § 353.103](#)(b). The Board has held that an employee who was absent from work because the agency removed her for cause, rather than for reasons substantially related to her compensable injury, is not entitled to restoration. *Frye v. U.S. Postal Service*, [102 M.S.P.R. 695](#), ¶ 9 (2006); *King v. Department of the Navy*, [90 M.S.P.R. 341](#), ¶ 8 (2001).

¶9 Here, the administrative judge made no explicit finding as to whether the appellant was absent from work because she had been removed for cause. ID at 2 n.2. The administrative judge determined, however, that OWCP's termination of the appellant's benefits meant that she did not have a compensable injury. ID at 4. An arbitrator has now ordered reversal of the removal action. PFR File, Tab 3 at 7-31. Thus, the agency did not impose a valid removal for cause and it now appears that the appellant was absent for reasons substantially related to her compensable injury. *Cf. Beltran v. U.S. Postal Service*, [50 M.S.P.R. 425](#), 430 (1991) (OWCP's delay in resolving the appellant's claim for compensation cannot defeat his restoration rights). Specifically, although OWCP originally terminated the appellant's benefits on April 10, 2007, IAF, Tab 12 at 77-78, it has since reversed itself. The appellant received periodic payments from OWCP covering the time period at least from 2007 through January 24, 2011. IAF, Tab

25 at 11-12. We find, therefore, that the appellant has made a nonfrivolous allegation that she was absent from her position due to a compensable injury. *See Burnett v. U.S. Postal Service*, [104 M.S.P.R. 308](#), ¶ 8 (2006) (a compensable injury is a medical condition accepted by OWCP to be job-related and for which medical or monetary benefits are payable from the Employees' Compensation Fund).

¶10 We also find that the appellant has made nonfrivolous allegations that she is partially recovered and that the agency denied her requests for restoration. An individual's receipt of partial disability compensation generally suffices to establish that she is a partially recovered individual. *Gilbert v. Department of Justice*, [100 M.S.P.R. 375](#), ¶ 17 (2005); *Hicks v. U.S. Postal Service*, [66 M.S.P.R. 137](#), 142 (1995). Further, in her requests for restoration, the appellant alleged that she was able to work in a primarily sedentary job if provided a chair with back support and with medical restrictions limited to no pushing, pulling, or lifting over five pounds, and no bending or stooping. IAF, Tab 20 at 32; *see also id.* at 28-29. It is undisputed that the agency denied her requests for restoration. IAF, Tab 20 at 31-35, Tab 25 at 2-3.

¶11 As to the final prong of the jurisdictional test, the appellant alleges that the agency denied her request because it believed that she was not entitled to OWCP benefits because she obstructed OWCP's efforts to obtain documentation concerning her medical condition. *See* IAF, Tab 25 at 4-5. That belief, however, turned out to be incorrect because OWCP eventually determined that the appellant was entitled to benefits at least from 2007 through January 24, 2011. *Id.* at 11-12. Moreover, the agency removed the appellant for her inability to return to duty after a year's absence. IAF, Tab 12 at 55. That removal was later found to be procedurally improper and was overturned by an arbitrator. PFR File, Tab 3 at 7-32. Under the circumstances, we find that the appellant has made a nonfrivolous allegation that the agency's denial of her request for restoration was arbitrary and capricious. *See Tat*, [109 M.S.P.R. 562](#), ¶ 18 (the appellant made a

nonfrivolous allegation that the agency's denial of his request for request for restoration was arbitrary and capricious when it concluded that he did not have a compensable injury even though OWCP found that his medical condition was compensable). Because the appellant has made nonfrivolous allegations that, if proven, would establish jurisdiction over her appeal, she is entitled to a jurisdictional hearing.\* *See Latham*, [117 M.S.P.R. 400](#), ¶ 74.

#### ORDER

¶12 Accordingly, we REMAND the appeal for a jurisdictional hearing consistent with the above analysis. Should the administrative judge find jurisdiction over the appeal, she shall adjudicate the appellant's discrimination claims.

FOR THE BOARD:

---

William D. Spencer  
Clerk of the Board  
Washington, D.C.

---

\* On remand, the administrative judge should consider the appellant's allegations of discrimination to the extent that they bear on the jurisdictional issue in determining whether the appellant has proven jurisdiction over her appeal. *Latham*, [117 M.S.P.R. 400](#), ¶¶ 58, 76.